

The

ARBITRATION JOURNAL

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QUARTERLY OF THE AMERICAN ARBITRATION

Volume 12, No. 3



ASSOCIATION

1957

THE ARBITRATION JOURNAL

VOLUME 12

1957

NUMBER 3

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The Arbitration Journal is published quarterly by the American Arbitration Association, Inc.: Nicholas Kelley, President; Sylvan Gotshal, Chairman of the Board; A. Hatvany, Secretary-Assistant Treasurer. Annual subscription: \$4 in the United States; \$4.50 elsewhere in the Western Hemisphere; \$5 foreign; single copies \$1.50.

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AN EDITORIAL

IN a recent research report of the American Arbitration Association, the second part of which appears in this issue of *The Arbitration Journal*, the outcome of certain categories of grievances are shown in terms of "wins, losses and divided awards." An introductory paragraph explains that these figures, compiled in response to many requests, are capable of a great deal of misinterpretation. It is pointed out by way of illustration that an award directing reinstatement of an employee without back pay, while tallied as a "divided" award, might really have been a union victory, representing all that could reasonably be hoped for in view of the circumstances surrounding the discharge. On the other hand, it might have been more meaningfully classed as a company victory if one could have taken into account the fact that restoration of the man to his job without retroactive compensation had been offered by management prior to arbitration. Thus, any conclusion that one side "wins" or "loses" cases in arbitration in a certain percentage is unwarranted.

Equally deluding is the notion that one can predict the outcome of a grievance on the basis of the "box score" kept on the arbitrator or even on the basis of an intensive reading of published awards. The chief fact to be remembered is that the arbitrator's frame of reference—the collective bargaining agreement and the relationship between the parties—is seldom found duplicated in identical form.

In one of the cases studied in the AAA research project, for instance, the arbitrator had to decide whether an employee not asked to work on a Saturday was "laid off" for the day (in which case his seniority was violated) or merely by-passed in assignment of overtime (which management had a right to do without regard to seniority). Determination involved not just an analysis of the overtime, seniority and layoff provisions of the agreement, but a study of the history of bargaining and of the reasons why certain phrases recurred in one part of the contract and not the other. It may have been pure whimsy when Humpty-Dumpty, in *Alice in Wonderland*, said: "When I use a word it means just what I choose it to mean, neither more nor less." But semantics is often serious business to the

arbitrator. Thus, even identically worded contracts may yield different interpretations, depending upon the meaning assigned to certain words and phrases by the parties in their past practice.

In discipline cases, there may be fewer problems of contract interpretation, but there are correspondingly greater difficulties in determining questions of fact and in weighing credibility of witnesses. No one with an understanding of the realities of labor relations will expect to find in a written opinion and award all of the arbitrator's observations and impressions. Yet, without those impressions, it would be naive to assume that the award reveals how he would decide another case, however similar in superficial appearance. Furthermore, the authority of the arbitrator usually varies from one labor-management situation to another. In one contract he may be limited to a ruling on whether the employee committed the offense with which he was charged; in another, his "frame of reference" may be so broad as to permit him to substitute his judgment for that of management and mitigate the punishment. It would be a rash and careless observer, not to say an unjust one, who would conclude from reading an award in a discipline case that the arbitrator had a "bent" one way or another, without knowing what the parties wanted of him.

All this is not to say that research into arbitration awards and the reading of arbitrators' opinions are of no value; on the contrary, they provide an excellent insight into the way labor and management are trying to solve common problems. But the best results of such study will come about when parties use the available material for the purpose intended, as educational tools, and not for the futile and self-defeating purpose of applying a mechanical formula to what is essentially a human relations problem.

PROCEDURAL AND SUBSTANTIVE ASPECTS OF LABOR-MANAGEMENT ARBITRATION

Part II of an AAA Research Report

In our study of the substantive aspects of labor-management arbitration we were primarily concerned with the separate grievances and the frequency of various types of disputes. Thus, the basis of our study was not the 1,183 cases reported in the procedural half of this report but the 1,728 separate grievances which were heard and decided in those cases. By the same token, it was decided to weigh all grievances equally, regardless of the number of employees concerned in the outcome. For instance, a controversy over computation of vacation pay for incentive workers that affected a number of employees was nevertheless counted as a single grievance despite the fact that the party demanding arbitration may have listed each employee's grievance separately. On the other hand, a dispute over discharge of two employees was counted as two grievances where separate awards were rendered, the arbitrator having found different fact situations in each instance. In short, it was not the manner in which the demand for arbitration or submission agreement was phrased that determined our tabulation but the separate issues that appeared on reading the awards.

In analysing the substantive issues in arbitration, the question of "arbitrability" presented a special problem. There were 41 cases where the sole issue before the arbitrator was whether certain grievances were within the scope of the arbitration agreement. In these situations, arbitrators were asked only for a decision on what usually amounted to a substantial contract interpretation issue but were otherwise barred from addressing themselves to the merits of the grievances. In 92 other cases, the defending party raised the question of arbitrability as a preliminary issue, with the arbitrator permitted to rule on the merits of grievances if they found the grievances properly before them. Often, deciding the question of arbitrability did not depend upon a ruling as to whether the controversy fell within the scope of the arbitration clause, but rather determining whether time limits or "conditions precedent" of the contract had been observed or, when it seemed apparent that time limits had been exceeded, whether they had been waived by the parties. Where

arbitrability was the sole issue, arbitrators found the grievances arbitrable more than 40% of the time. Where "no arbitrability" was entered as a preliminary issue, arbitrators found the disputes arbitrable more than three times out of four, in which cases arbitrators then proceeded to rule on the merits.

TABLE 27
Decisions on Questions of Arbitrability

	Number	Percentage
Where arbitrability was the sole question before arbitrator		
Issue held arbitrable	17	41.5
Issue held not arbitrable	24	58.5
Total	41	100.0
Where arbitrability was a preliminary issue before arbitrator		
Issue held arbitrable	71	77.2
Issue held not arbitrable	21	22.8
Total	92	100.0
All arbitrability issues		
Issue held arbitrable	88	66.2
Issue held not arbitrable	45	33.8
Total all arbitrability issues	133	100.0

As indicated above, arbitrability was the *sole* issue in 41 cases. The arbitrators' decisions in these cases are included in tabulations shown later in this report. The 71 cases in which arbitrability was upheld and the arbitrators proceeded to write awards on the merits of the grievances are also reflected in the discussion of the substantive issues that follow. However, in the 21 instances where arbitrators, although authorized to proceed on the merits of grievances, did not do so because they deemed the issues not arbitrable, the awards did not offer sufficient information on the exact nature of the grievances. These 21 cases were therefore excluded from the tabulations.

As shown by Table 28 below, there were 1,728 separate grievances heard and decided in the 1,183 cases studied. In 26% of the cases there were two or more separate issues, and in one case there were as many as 25. In most cases there were only single grievances, the only other important concentration being in the two-grievance group.

TABLE 28
Multiple Grievance Cases

	<i>No. of Cases</i>	<i>No. of Grievances</i>	<i>Percentage of Cases</i>
One grievance	876	876	74.0
Two grievances	188	376	15.9
Three grievances	60	180	5.1
Four grievances	38	152	3.2
Five or more grievances	21	144	1.8
Total	1,183	1,728	100.0

Most Frequent Grievances

The 1,728 grievances with which this report is concerned fell into 31 major classifications, as follows:

TABLE 29
Distribution of Grievances by Issue

<i>Type of issue</i>	<i>Frequency</i>
Discipline and discharge	
Inefficiency, negligence and damage to company property	111
Absenteeism	59
Dishonesty	32
Insubordination	29
Leaving job without permission	24
Refusal to perform job assignment	24
Assault and fighting	20
Strike activity	19
Intoxication	14
Abusive language	12
Slowdown	12
Union activity	12
Refusal to work overtime	11
Sleeping on the job	10
Lateness	9
Physical disability	9
Security risk	1
Miscellaneous	48
Total	456

<i>Type of issue</i>	<i>Frequency</i>
Seniority	
Layoff and bumping	125
Promotion and bidding rights	66
Transfer, including demotion	26
Work out of bargaining unit and seniority upon return	20
Recall from layoff	19
Super-seniority for union officials	19
Distribution of overtime	18
Computation of seniority	6
Miscellaneous	2
Total	301
Job evaluation issues	223
Incentive plans	107
Overtime	82
Vacation	61
Holidays	50
Wages	46
Welfare provisions	42
Arbitrability as the sole issue*	41
Foremen and supervisors	31
Hours of work	29
Guaranteed employment	26
Transfer	26
Union security issues	22
Observance of grievance procedure	19
Pay for time not worked	18
Apprentices and probationary periods	14
Call-in and reporting pay	13
Premium pay (other than overtime)	13
Progression and merit increases	13
Sub-contracting	10
Auxiliary pay practices	9
Leave of absence	8
Pensions	8
Severance pay	7
Union elections	5
Safety	4
Bonus (other than incentive)	2
Security risk (other than discharge)	1
Miscellaneous	41
TOTAL	1,728

* This does not include 92 cases where "no arbitrability" was asserted as a supplementary defense. In 71 of these situations, the arbitrator held the grievance arbitrable and proceeded to rule on the merits. Those awards are reflected in this table. In 21 cases where arbitrators did not go into the merits because they found the issues not arbitrable, the grievances were excluded from this tabulation.

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Of the 31 separate general listings in the table above, 13 receive no further comment, as there was little variation among the relatively few cases in each category and the heading adequately describes the nature of the grievance. With respect to 18 groups, however, some further explanation is warranted, for it was found that many of these categories presented not one, but several distinct aspects. Furthermore, on reading of arbitrators' awards it appeared that grievances classified in one way often involved quite different issues as contributing factors.

For instance, there were 100 discharge and discipline cases in which employees were charged with refusing to obey supervisors' orders and carry out work assignments. Underlying many of these, however, were important collateral issues of contract interpretation. Although arbitrators were primarily concerned with whether there was just cause for the disciplinary action taken, they were also obliged to make some comments about whether the work assignments the employees resisted were proper under the contract, whether the overtime they refused to perform could be imposed upon them against their will, etc. The following explanatory paragraphs are intended not to represent a comprehensive breakdown of all grievances in each general category but to show main patterns and illustrate interrelations between the groups.

In any discussion of labor-management arbitration, considerable interest inevitably centers on "who wins." In the consideration of 8 categories below figures are shown indicating the disposition arbitrators made of the issues before them. These figures, though interesting, may be subject to much varying interpretation and should be considered with a great deal of caution. In tabulating the outcome of awards, only three alternatives were possible: company sustained; union sustained; and divided awards, giving each less than was asked for in documents establishing the arbitrators' authority. In point of fact, however, "divided awards" may in many cases have been complete victories for one side or the other. Although a union may have demanded reinstatement of a discharged employee with full seniority and back pay, reinstatement without back pay (which we would have classified as a "divided award") may have been all the union could reasonably have expected. If all the background circumstances were known, such an award might more properly have been classified as a full victory for the union. And conversely, a similar award might in fact be listed as a full victory for management if one could take

into account that the company had offered to reinstate the employee without back pay during the grievance procedure prior to arbitration. The lost award which represents a "moral victory" for the loser is not by any means a novelty in labor-management arbitration. For these reasons, the "victory and defeat" statistics shown in this report must be evaluated with caution and the application of knowledge of how practical labor relations work.

Discharge and Other Forms of Discipline

Cases in this category, numbering 456, largely turned on fact situations, rather than interpretations of contract clauses. Typical questions before arbitrators were: Was the employee inefficient, negligent and insubordinate? Did the aggrieved employee's record of absence and lateness exceed tolerable limits? Did he threaten physical violence against a supervisor or another employee? Had he reported for work in an intoxicated condition? Even where facts were established arbitrators were generally still faced with the question of whether the discipline was reasonable in view of the worker's past record and the company's policy of promulgating and enforcing the breached rule. In a small number of situations, collective bargaining agreements had barred the arbitrator from doing more than establishing the facts, thus denying them the authority to mitigate the management discipline where the employees were found guilty as charged. Fighting on company premises often presented difficult problems in administration of justice through arbitration. Company policies frequently include discharge of both employees who engage in physical violence, regardless of who was the aggressor or who inflicted more injury. This sometimes proved difficult of enforcement where provocation was extreme; arbitrators were also hard put to determine, on occasion, whether an employee who was assaulted by another was merely defending himself instinctively, or was fighting back. A study of the large number of discipline and discharge awards indicated that most, but not all, related to personality problems and work habits of individual employees. A number of arbitration cases classified under discipline had their origins in disputes over work assignments, distribution of overtime and similar grievances. It appeared that in a limited number of situations employees chose to test the meaning of the collective bargaining agreements by refusing to obey orders which they believed to be in violation of their contractual obligations. Our study of awards in such situations leads to the

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conclusion that arbitrators generally uphold reasonable discipline imposed in these "test cases" even where the aggrieved employees were correct in their interpretation of the contract.

The two tables below suggest that management's original decision is upheld more often when it involves some form of discipline other than discharge.

TABLE 30
Disposition of Discharge Cases

	<i>Number</i>	<i>Percentage</i>
Discharge sustained	149	46.4
Reinstatement with full back pay	60	18.7
Divided (generally reinstatement without full back pay)	112	34.9
Total	321	100.0

TABLE 31
Disposition of Discipline Cases Other Than Discharge

	<i>Number</i>	<i>Percentage</i>
Discipline sustained	76	56.3
Grievance sustained	45	33.3
Divided	14	10.4
Total	135	100.0

Seniority

There were few among the 301 seniority issues in which the primary question was found to be the relative place of a worker on a seniority roster. This was probably because an employee's length of service is capable of exact measurement. At any rate, most seniority cases came about through attempts by employees to assert length of service to avoid layoffs or to achieve certain advantages, such as promotions, job transfers, or preferential treatment in overtime. In these situations, the question before the arbitrators usually was whether the senior employees had the necessary "ability and qualifications," as defined in the collective bargaining agreement. The special problem of "super-seniority" of union stewards appeared in a few cases, primarily involving layoffs, recall and distribution of overtime. In one of these instances, the controversy concerned not only the right of a steward to be assigned to extra hours while others of his shift worked overtime,

but the union's further contention that the steward must be given work not otherwise required on overtime, thus preventing displacement of another employee. In the few cases where the issue turned on computation of seniority, arbitrators had to deal with complicated matters of contract interpretation. Typical of this category were disputes over the seniority status of employees who interrupted their service to become foremen or to work in some department not covered by the collective bargaining agreement. Sometimes the issue was whether they could return at all except as new employees without seniority; at other times the right to return was not in dispute, only the question of whether the employee merely retained seniority he had before the transfer or whether he accrued more while outside the bargaining unit. An infrequent, but interesting case concerned reconciling two or more seniority lists on the merger of two companies. Table 32, below, shows how arbitrators resolved seniority grievances.

TABLE 32
Disposition of Seniority Cases

	<i>Number</i>	<i>Percentage</i>
Grievance denied	165	54.8
Grievance upheld	127	42.2
Grievance partly upheld, partly denied	9	3.0
Total	301	100.0

Job Evaluation

Special problems were encountered in analyzing the 223 grievances classified under this heading. The chief difficulty was in the fact that many disputes on the surface seemed to be job evaluation questions while in fact they were disguised requests for individual wage increases or adjustments of incentive rates. And conversely, there were protests against work assignments (out of classification) and claims of wage inequities which were really protests against alleged misclassification of individual jobs within a system of labor grades. For purposes of this study, therefore, we placed in the category of *job evaluation* all grievances relating to the ranking of jobs within a more or less formal system or to the relationship between one job and another. By the same token, we excluded from this paragraph disputes over attempts to keep work within one classification rather than another or grievances in which incentive rates were challenged. These latter controversies, since they did not call into question the

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relative position of jobs as such, were discussed in other sections of this report. Job evaluation disputes, within our definition, naturally came about more frequently in larger establishments, and these cases accounted for a large number of the multiple-grievance arbitrations shown in Table 28.

In 91 of the 223 grievances, unions sought re-evaluation of certain factors, such as "education," "responsibility for materials and equipment," "experience," etc. These requests for reconsideration were sometimes based upon alleged errors in the original job evaluation; but more often they were occasioned by changes in materials used and in product design. Typical of these 91 cases was one in which the union challenged the figure of \$1000 as the probable damage to a machine that might be caused by work errors. By increasing that figure, the union sought to increase the "point value" assigned to "responsibility for material or product," thereby putting the job into the next higher labor grade.

Consolidation of two or more jobs into one brought 78 cases to arbitration in which the primary issue was the proper "slotting" of that job within the job evaluation plan. A collateral issue was sometimes presented in protests by unions that management had no right under the contract to change or eliminate jobs without prior consultation and/or negotiation. Creation of completely new jobs accounted for most of the remaining job evaluation grievances. As a rule, determination of the proper location of one job in a system of ranking had implications for other jobs as well, both management and the unions seeking to avoid "inequities" and internal inconsistencies. The following table shows how arbitrators ruled in the job evaluation cases.

TABLE 33
Disposition of Job Evaluation Cases

	<i>Number</i>	<i>Percentage</i>
Grievance denied	127	57.0
Grievance upheld	70	31.4
Grievance partly upheld, partly denied	26	11.6
Total	223	100.0

Incentive Plans

Piece and incentive rates accounted for 107 arbitration cases. Mostly, these grievances came about when either the company or the union sought to modify rates which it was alleged were either

too "loose" or too "tight." Often, a collateral question was raised as to whether management had the right to re-time jobs unilaterally and set new rates, subject to later grievances, or whether once having been set, rates could be changed only by negotiation. The typical collective bargaining agreement was found to contain some provision for changes in incentive rates where alterations occur in methods of production. In a considerable number of the incentive cases, arbitrators were asked to decide whether the changes that occurred in production methods were sufficient to justify changes in rates and if so, could the rate for an entire job be re-evaluated or were permissible changes limited only to the elements of the job that had undergone a change. "Down-time" was another sizeable issue. Under many incentive plans, employees who could not maintain their regular production because of machine breakdown, inadequate supply of materials, or other conditions beyond their control, would be paid for that time on the basis of average incentive earnings rather than at base rates, provided they gave foremen a record of such time. Questions of fact were inevitably presented for arbitrators to determine when employees claimed inability to earn incentive rates because of inadequate machine maintenance and when management counter-claimed that a deliberate slow-down had been practiced. Among the miscellaneous incentive questions raised were: Under a group incentive plan, may a company replace a regular worker with an apprentice where the union claims this has an adverse effect on group earnings? Is an incentive-rated employee entitled to his average earnings, rather than base rates, when transferred from an incentive job to an hourly-rated job for the convenience of the company? And under the same contract, would it make any difference if he were transferred for his own convenience, to avoid layoff? To what extent may management deduct from incentive earnings for defective work that must be re-done? As the table below shows, union grievances were denied in slightly over half the cases.

TABLE 34
Disposition of Incentive Plan Cases

	<i>Number</i>	<i>Percentage</i>
Grievance denied	55	51.4
Grievance upheld	37	34.6
Grievance partly denied, partly upheld	15	14.0
Total	107	100.0

Overtime

The overtime problem in arbitration was found to be chiefly one of applying the standards for distribution provided in collective bargaining agreements. Most frequently, contracts required that extra work opportunities be given to those who performed the jobs during regular hours or that overtime be divided "as equally as possible" among employees within job classifications. Less often, seniority was the criterion for apportioning overtime. Attempts to apply more than one standard at a time presented unusually difficult problems of contract interpretation, as when overtime had to be divided equally among job classifications and shifts simultaneously. On the other hand, fact situations, rather than contract interpretations, were at issue when seniority was the chief criterion and disputes arose as to whether the senior employees were capable of performing the work available during the overtime hours. In a significant number of cases, the matter before the arbitrators was not who should have gotten the overtime but what was the proper remedy for management's admitted error in administering the overtime roster. Employers usually contended that equalization at the next opportunity would be appropriate, while unions argued that back pay to the by-passed employees was the only appropriate remedy. While aggrieved employees usually sought more overtime, it was not so in all cases. There were several controversies growing out of management's attempt to compel unwilling employees to work extra hours. Often, however, these disputes which originated in varying interpretations of the overtime provisions of contracts were transformed into discipline cases when employees, refusing to work, were suspended or discharged. The table below shows the disposition arbitrators made of overtime cases before them. The relatively few split decisions suggest that, unlike discipline and other types of cases, overtime disputes do not readily lend themselves to decisions that are not clearly one way or another.

TABLE 35
Arbitrators' Awards in Overtime Cases

	<i>Number</i>	<i>Percentage</i>
Grievance denied	42	51.2
Grievance upheld	35	42.7
Grievance partly denied, partly upheld	5	6.1
Total	82	100.0

Vacations

Of the 61 vacation grievances, 14 concerned the appropriate rate of pay. This difficulty arose when wage rates went up just before the holiday without an understanding by the parties as to whether vacation pay would be based upon rates during the previous year or on rates at the time the vacations were taken. This type of problem arose not only when general increases preceded the vacations but also in cases of individual promotions, merit and progression increases and downward transfers and bumping. Vacation rights of employees on layoff, sick leave and disciplinary suspension were also subject to disputes. Often, a distinction had to be made between eligibility for vacations, which accrued while employees were not on the active payroll, and the amount of vacation pay they would get. The timing of vacations proved to be an important source of grievances. Did the company have the right to close the plant and force all employees to take their vacations at one time? Did an employee who had insufficient seniority for a vacation during the summer have the right to take his vacation in the winter as soon as he established eligibility? Could an employee assert his seniority to claim a preferred vacation period? These were some of the questions put before arbitrators. Relatively few, but very interesting, were cases that had to do with pro-rata vacations for employees who quit, vacation money for the widow of a deceased employee, and vacation rights of employees when the company was taken over by a new owner. Arbitrators decided vacation grievances as follows:

TABLE 36
Disposition of Vacation Cases

	<i>Number</i>	<i>Percentage</i>
Grievance denied	20	32.8
Grievance upheld	37	60.6
Grievance partly denied, partly upheld	4	6.6
Total	61	100.0

Holidays

Disputes over eligibility of employees for holiday pay accounted for 50 grievances. Included was the problem of whether employees on the seniority roster but not currently drawing pay, such as those on layoff or sick leave, were nevertheless entitled to holiday pay. Somewhat similar were the relatively few cases relating to holidays

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that fell during vacation periods or on days when no work was scheduled. Most collective bargaining agreements required work on the surrounding days as a condition for receiving holiday pay, but controversies occurred when employees worked only part of those days or were absent for some reason beyond their control. A typical problem of this kind was the following: Under a contract which required work on the scheduled day before and after the holiday as a condition for holiday pay, was an employee excused from work the day before deemed not "scheduled?" In other words, did the aggrieved employee have a "scheduled day" of his own or did the day before the holiday, scheduled for the rest of the plant, apply to him despite his excused absence? Relatively few cases occurred in which parties could not agree on the rate of pay when employees were called in to work on a paid holiday. One grievance, relating to the appropriate rate of pay for holidays, was brought about when an employee, on finding the rate of premium pay for working not to his liking, claimed the right to refuse to work on a paid holiday and still collect regular pay for the day. The "won" and "lost" record in this category is shown below:

TABLE 37
Disposition of Holiday Pay Cases

	<i>Number</i>	<i>Percentage</i>
Grievance denied	23	46.0
Grievance upheld	22	44.0
Grievance partly upheld, partly denied	5	10.0
Total	50	100.0

Wages

Wage disputes accounted for 46 single-issue cases. In this category were included only questions involving general wage structures; grievances in which parties sought to correct individual wage inequities are discussed elsewhere in this report. For the most part, wage issues came to arbitration through wage reopening clauses of collective bargaining agreements. In a few instances, new contracts were involved, with wages being the predominant point of difference between management and unions. In most cases where arbitrators were called upon to decide whether, and to what extent, general wage levels should be increased or decreased, they took into account all criteria submitted to them—wages paid in similar establishments in

the industry and area, cost of living, productivity, etc. In some situations, however, arbitrators were required by contract to render awards which would maintain a relationship between wages and changes in the cost of living. As a rule, parties did not require that wage increases (or decreases) be limited to the exact amount of change shown by the Consumers' Price Index of the Bureau of Labor Statistics. Apparently, where parties wanted an exact mathematical ratio maintained there was no possibility of controversy and no occasion for the matter to go to arbitration.

Foremen and Supervisors

Foremen and supervisors were found to be excluded generally by contract from bargaining units and barred from doing production work except in emergencies or when necessary to instruct employees. In a majority of the 31 grievances concerning foremen, unions protested that bargaining unit employees' rights were being infringed upon by foremen who did production work under circumstances not permitted by contracts. In a significant minority of the cases, grievances alleged that certain bargaining unit jobs—inspection, for instance—were eliminated and elements of those job duties transferred to foremen. The problem of determining the status of foremen and supervisors on being reduced to production jobs is essentially one involving interpretation of seniority provisions of contracts. Grievances on this matter are commented on in the Seniority paragraph of this report. The issue of discipline, with respect to foremen, arose in only one case in which a union sought a ruling that working rules and regulations which had been negotiated for bargaining unit employees also applied to employees outside the unit.

Hours of Work

The issue behind almost all of the 29 grievances in this category was whether or not the contract permits management to change unilaterally the customary daily starting time and lunch periods or alter established policy with respect to shifts. A problem of another sort, involving an apparent conflict with the seniority and layoff provision of a contract, was presented when a company sought to reduce the work-week from eight hours as an alternative to layoff of junior employees.

Observance of Grievance Procedure

There were 19 grievances in this classification, mostly growing out of complaints by unions that management was placing impediments in the way of satisfactory investigation and processing of grievances. In one case, for instance, the issue was whether the company had the right to limit the number of stewards who would be permitted to attend grievance meetings. In another, the problem related to the frequency of grievance committee meetings and to the right of employees to be represented by stewards in the early steps of grievance procedure. Disputes over pay for stewards while negotiating grievances and assignment of union stewards to overtime hours are commented on in other paragraphs of this report. An interesting question arose in two cases where there appeared to be a difference of opinion between companies and unions as to whether wage adjustments made as a result of grievances should be made retroactive to the date of the grievance or to the time agreement was reached.

Pay For Time Not Worked

Demands for pay for travel time, paid lunch periods and pay for union stewards while negotiating grievances were among 18 miscellaneous grievances, all concerning pay for time not worked (other than vacations, holidays and rest periods). In several cases, the issue was not whether such time should be paid for, but rather the appropriate rate. Perhaps the most unusual question in the group was whether a shop steward should be paid for time spent in preliminary investigation of what did not eventually turn out to be a formal grievance.

Apprentices and Probationary Periods

Practically all of the 14 grievances in this group concerned one question—whether management could discharge employees who had not completed their probationary periods without a showing of “just cause.” In a few situations, a secondary issue was involved in determining whether these probationary periods were “30 days of work” or “30 calendar days.” This made a considerable difference where a brief layoff interrupted the first month of employment. Of somewhat the same nature was the controversy over whether a paid holiday, on which no work was done, could be counted as a day worked for purposes of computing when a probationary period was completed.

Call-in Pay

Almost all the call-in pay disputes, of which there were 13, involved determination as to whether the circumstance which prevented work was one which could be deemed an "emergency" or "Act of God" within the meaning of collective bargaining agreements. In several instances, even where the union agreed that there was an emergency, the question still remained whether the company had done all it could, or was contractually obligated to do, in notifying employees not to report for work. The appearance of "hurricane Carol" along the East Coast illustrated the problem. When only 20% of the workforce reported, a number which the company deemed too few for efficient operations, were these workers entitled to 4 hours' call-in pay? Or did the general warnings about the storm over the radio and in newspapers constitute adequate notice to employees not to report? In two cases, arbitrators had to decide whether a wildcat strike in one department prevented an employer from providing employees of another department with work, and in two other cases the issue was whether workers who reported late (after others had been assigned to their jobs) thereby forfeited their right to all or part of their call-in pay.

Leaves of Absence

There was little fundamental uniformity among the 8 cases in this classification. Five grievances were brought about by employers' refusal to grant leaves of absence requested for a variety of reasons. In a sixth case, the union protested an employer's insistence that an employee apply for a leave covering past absence due to illness as a condition for reemployment. In a seventh, the issue was whether the company could require physical examinations of employees returning from leaves. The last case, perhaps the most unusual of all, involved an employee who sought a leave of absence for the purpose of becoming a paid officer of the union, assigned to organize other plants of the company.

Progression and Merit Increases

For the purpose of this study grievances over application of automatic progression plans and merit increases were considered together, although the two types of individual wage adjustment are often dealt with separately in collective bargaining agreements. All together, there were 13 such grievances. Nine disputes were brought

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to arbitration on complaints by unions that management had discriminated against certain employees who were denied merit increases or that the company had made a fundamental change in standards for merit review in such a way as to affect adversely all employees. Where collective bargaining agreements provided for automatic length-of-service wage increments to the top of the rate range (in one case to the mid-point), disputes concerned whether time spent on leave of absence could be computed as time worked so that the returning employee would find himself at a higher level than when he left. There were four such disputes.

Pensions

Pension issues brought only 8 cases to arbitration. Half of them concerned the original seniority date of employees who were about to be retired. In at least two of these 4 cases it appeared that aggrieved employees began working for the company about 20 years earlier, before the union was recognized as bargaining agent, with the result that seniority records were not completely accurate. Two pension cases were not controversies in the strict meaning of the term. The employers in both cases had experienced financial difficulty and while they admitted their indebtedness, asserted inability to make prompt payment. The union's object in carrying the case through the grievance procedure to arbitration was to get an award which could establish a base for future litigation if that became necessary. In one of the 8 pension grievances, an employee approaching normal retirement age sought to delay his separation from the payroll until such time as he would become eligible, by seniority and earnings, for a pension. The eighth case had to do with pension rights of employees of a company about to go out of business.

Severance Pay

In three of the seven grievances that came to arbitration, the arbitrator was called upon to decide whether discharged employees had been guilty of such gross indiscretion as to forfeit their rights to severance pay. These three cases arose in the newspaper publishing industry, where contracts covering editorial employees include severance pay benefits even to employees discharged for "just cause," but not for those whose offences were of an aggravated nature. An example was the case of an announcer at a broadcasting company who committed 14 minor infractions, chiefly involving lateness, within a

short period of time. Of perhaps greater interest to industry generally were two disputes over whether dismissal of employees was the result of "technological displacement." The collective bargaining agreement had provided for severance pay to those whose jobs were eliminated by "automation" but not to those who were displaced through permanent discontinuance of their operation or through a combining of jobs for reasons of operating economy. In the two remaining cases, the controversy was not over whether employees were entitled to severance pay but merely the basis of computation. In one of these cases, the problem was whether time spent in the armed forces was to be regarded as time worked for this purpose; in the other, the dispute was over computing time spent on leaves of absence.

Conclusion

For a number of years, published opinions and awards have been a most important source of research in the field of labor relations. Relying on the insight into labor-management problems and solutions which these awards afford, some scholars and writers have found what they regard as basic principles followed by most arbitrators in rendering their decisions. It is asserted that the large body of published awards, and the general exchange of knowledge and information about arbitration, have brought about what amounts to distinct patterns in application and interpretation of collective bargaining agreements.

Whether such uniform patterns really exist could not be determined from our study of these 1,728 grievances. Too many variables were found to exist among these cases. There were over 50 separate issues involved, in virtually every industry and in all areas of the country. Furthermore, many cases which at first glance seemed to be similar enough to lend themselves to comparative analysis were found, on closer examination, to be unique in some essential respect. For it must be remembered that the arbitrator's frame of reference is the collective bargaining agreement and the union-management relationship in a particular establishment. The precise phrasing of a contract clause; the choice of words used; the history of bargaining; the peculiarly individual circumstances and personalities involved; the record of past practice which, in some situations, appears to be at variance with the clear and unambiguous language of contracts; the credibility of witnesses; and the skill with which cases are argued in arbitration—all these and many other factors

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play a part in the final determination of the issue by the arbitrator.

Under the circumstances, the sample of 1,728 grievances was too small to permit a conclusion as to the existence or nature of a "common law" of labor arbitration. This survey does, however, provide information which every labor and management representative can examine in a critical evaluation of his own arbitration and grievance processing experience. It is the plan of the American Arbitration Association to continue collating and codifying the thousands of cases arbitrated under its administration and it is hoped that this will provide the knowledge and information necessary to parties for improving their labor-management relations.

ARE ALL INTERPRETATIONS "ADMISSIBLE"?

by Le Roy Marceau*

One of the more intriguing doctrines in the field of arbitration is the "clear language" doctrine. It is a rule of construction which courts apply when they are called upon to interpret the arbitration clause of a contract. The rule provides, in effect, that an arbitration clause which says that the arbitrator can "interpret" the contract ordinarily means that where there is ambiguity he can select any admissible meaning, but does not mean that he can deviate from clear language where there is no ambiguity.

Arbitration is the child of contract. As Judge Cardozo expressed it in a classic statement: "No one is under a duty to resort to these conventional tribunals, however helpful their processes, except to the extent that he has signified his willingness."¹ Thus, no one can be required to arbitrate a particular issue unless it is the kind of issue he has agreed to arbitrate. The arbitration clause of the contract will determine what kind of issue that is.

When the parties are drafting the arbitration clause, and pondering what kind of issues to refer to the arbitrator, one of the questions they face is whether to refer issues of arbitrability. Shall they authorize him to decide whether or not a particular question is arbitrable? For unless the arbitration clause confers this power on the arbitrator, it will remain where the statutes have put it—with the courts of general jurisdiction. Assuming that the parties have not referred questions of arbitrability to the arbitrator, the judges have no choice but to resolve them. Whenever a plaintiff sues to compel arbitration of a particular issue, and the defendant protests that the issue is not the kind of issue that the parties have agreed to arbitrate, the court must decide between them by interpreting the arbitration clause.

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1. *Marchant v. Mead Morrison Mfg. Co.*, 252 N.Y. 284, 169 N.E. 386 (1929).

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Let us turn, then, to the kind of arbitration clause which the courts ordinarily have before them in this situation. While arbitration clauses offer considerable diversity, a substantial number of them—probably a large majority—authorize the arbitrator to construe the agreement but prohibit him from altering it. He may interpret but may not change. This makes it necessary for the court to distinguish between "interpretations" and "changes." The question frequently arises in this way. The plaintiff asserts that a particular clause of the contract has a certain meaning, or he presents a claim which is predicated upon that meaning. In either case, he asks that the correctness of that meaning be established by the arbitrator. The defendant replies that the proposed meaning is not only incorrect but is "inadmissible"—that is, so clearly incorrect that under the arbitration clause of the contract the arbitrator has no power to adopt it. In that posture, when the court is to decide issues of arbitrability, the court must decide whether or not the arbitrator has power to adopt the proposed meaning or, as we have expressed it, whether the proposed meaning is "admissible."

How do the courts decide such questions? While the issue has been squarely presented to relatively few courts, it seems fair to say that those few have been of one mind. They have begun by realizing that they must draw some line between "interpretation" and "change." In drawing that line they look upon interpretation as the process of determining what the Restatement calls "the meaning that would be attached *** by a reasonably intelligent person ***."² They realize that different "reasonably intelligent persons" may attach different meanings to the same language—sometimes widely divergent meanings. Whenever two "reasonably intelligent persons" might attach different meanings, the courts consider the language "ambiguous" and thus open to interpretation. They look upon the authority to interpret as the authority to select any particular meaning that *any* reasonably intelligent person might attach. But a meaning which *no* reasonably intelligent person could attach is, in the opinion of the courts, "inadmissible." They feel that to adopt such a meaning would be not to "interpret" but to misinterpret, and thus to "change."

Let us turn now to the actual words which the judges have used in explaining their point of view. In the New York Court of Appeals, the dissenting judges in the *Cutler-Hammer* case implied that a provision is ambiguous whenever "reasonable men can differ"

2. Restatement of the Law of Contracts, Sec. 230.

as to its meaning.³ In the Appellate Division of the New Jersey Superior Court, the judges in the *Standard Oil Union* case described an inadmissible meaning as one "that no ordinary layman, acting in good faith, would seriously advance."⁴ In the Appellate Division of the New York Supreme Court, in the *Cutler-Hammer* case, the judges described an inadmissible meaning as one "clearly contrary to the plain meaning of the words" and described an admissible meaning as something which the "contract can possibly mean."⁵ Though these words of the judges vary slightly from case to case, it is submitted that they all mean the same thing—that a meaning is inadmissible if no reasonably intelligent person would adopt it.

When scrutinized in this way the position of the courts seems perfectly reasonable if not inevitable. A contrary position would blur the distinction between interpretation and change, and would open the collective bargaining contract to every conceivable interpretation, so that no provision in it would be unambiguous, and neither party could be certain about anything. The power to "interpret" would become the power to impose any conceivable obligation.

Opponents of the "clear language" doctrine may protest at this point that they do not wish to maintain that every conceivable meaning is admissible—that they maintain only that the arbitrator should be the one to say which meanings are admissible and which are not. They forget that the decision as to what is *admissible*, being a decision as to what meaning the arbitrator is authorized to adopt, is essentially a decision as to what is *arbitrable*—a matter which in these cases the parties have left to the court. More than is generally realized, the outcry against the "clear language" doctrine is a protest against a decision which the parties themselves have made—namely, to prohibit the arbitrator from changing the contract and to have the court decide what constitutes a change.

We need hardly add that no court has ever said that a party seeking arbitration must establish to the satisfaction of the court that the meaning he alleges is correct, or even that there is an equal chance of it being correct. All that is ever required is that the contract be ambiguous and the proposed meaning admissible. The situation here is very like the situation in which courts rule that evidence

3. *I.A.M. v. Cutler-Hammer, Inc.*, 297 N.Y. 519, 74 N.E. 2d 464 (1947), affirming 271 App. Div. 917, 67 N.Y.S. 2d 317.

4. *Standard Oil Union v. Esso Co.*, 38 N.J. Super. 106, 118 A. 2d 70, 25 LA 868 (N.J. Super. Ct., App. Div., 1955).

5. *Supra*, note 3.

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is not sufficient to go to the jury. Just as courts prevent the arbitrator from accepting "inadmissible meanings," so they prevent the jury from accepting "incredible evidence." Just as they call evidence incredible when "no reasonable man could accept it or base an inference on it"⁶ so they call a meaning inadmissible "when no ordinary layman acting in good faith would seriously advance it."⁷

We turn then to the next question. As particular cases have arisen, have the courts correctly decided whether the "clear language" doctrine was applicable—that is, whether the meanings advanced by the various plaintiffs were in fact admissible? Have they usually been correct in their judgment as to what meanings a reasonable man could or could not accept? Here are a few examples of their work. In the leading case on the subject, the *Cutler-Hammer* case,⁸ the New York Court of Appeals held that the obligation "to discuss payment of a bonus" clearly did not mean to pay a bonus and discuss how much. In the *General Electric* case, the court held that to withhold pension credits for all time lost, regardless of whether it was lost by illness, union activity or any other reason, clearly was not "discrimination against any employee *** because the employee (was) acting as a representative of the Union."⁹ In the *Textile Union* case¹⁰ the Appellate Division of the New Jersey Superior Court considered a contract giving vacation rights to "each employee in the employ of the Company on May 1st" and "all employees laid-off after March 1st but before May 1st." It held that these words clearly did not include any employees who were not employed at any time between March 1st and May 1st. In the *Western Union Telegraph* case the contract provided that "there shall be no strikes or other stoppages of work." The New York Court of Appeals held that this clearly prohibited a concerted refusal by telegraph operators to handle cablegrams or telegrams which, at some point in their transmission, had been handled by a company where a strike prevailed.¹¹ In the *Davenport* case¹² the contract provided that "the companies now

6. *Blum v. Free Grown Preserves Corp.*, 292 N.Y. 241, 54 N.E. 2d 809 (1944).

7. *Supra*, note 3.

8. *Supra*, note 3.

9. *In re General Electric Co.*, 300 N.Y. 262, 90 N.E. 2d 181 (1949).

10. *Textile Union v. Firestone Div.*, 6 N. J. Super. 235, 14 LA 129 (N.J. Super. Ct., App. Div., 1950).

11. *In re Western Union Telegraph Co.*, 299 N.Y. 177, 86 N.E. 2d 162 (1949), affirming 274 App. Div. 754.

12. *Davenport v. Procter & Gamble Mfg. Co.*, 241 F. 2d 511, 27 LA 820 (C.C.A. 2d, 1957).

used (in a wage survey) will not be changed except after consultation with the union." The United States Court of Appeals for the Second Circuit held that this language clearly did not require the employer to substitute another company for one of the companies now used.

Everyone must evaluate these decisions for himself. It seems fair to say in each case that, while the proposed interpretation which the court had before it was very far-fetched, there was still room for a difference of opinion as to whether it was so utterly far-fetched that no reasonably intelligent man could adopt it. In other words, with respect to arbitrability, these were reasonably close cases. It would be easy to compile a list of close cases that have gone the other way; where the courts have decided that particular interpretations, although rather far-fetched, were not quite so far-fetched as to be inadmissible. A union recently contended, for example, that the words "discharge without just cause" should be interpreted to include the termination of employees when their plant was shut down while other plants of the same employer continued to operate. The Appellate Division of the New York Supreme Court considered this interpretation admissible.¹³ In such decisions, too, there is room for an honest difference of opinion. In our age of wonders, it is not easy to draw the line between the reasonable and the unreasonable, the credible and the incredible. When men decry and sometimes even traduce the courts for their decisions in this difficult area, they are simply bringing into the courthouse that penchant for overstatement that is so natural at the bargaining table.

13. *In re Acme Backing Corp.*, 2 A.D. 2d 61, 152 N.Y.S. 2d 889; affirmed 2 N.Y. 2d 963, 162 N.Y.S. 2d 363 (1957).

ARBITRATION IN ANCIENT EGYPT

This article is the first in a series of studies on the History of Arbitration, the material for which was compiled and edited by MRS. MARGIT MANTICA, research associate with the American Arbitration Association during the years 1949 to 1951. Additional chapters in this valuable collection of data will appear from time to time in future issues of THE ARBITRATION JOURNAL. The editors wish to express their appreciation to Mrs. Mantica for the thorough and highly intelligent manner in which the difficult task of assembling and arranging data on the early history of arbitration was carried out.

It might well be assumed that the Egyptians, who maintained close contact with the Assyrians, Babylonians and Hittites, must also have frequently practiced arbitration. A proof of this supposition can be found in their myths, generally a reliable source of information regarding the mentality and the traditional ways of a people. Herman Kees writes: "It is characteristic for the way of thinking of the Egyptians that in their recorded legends feuds for power were less frequently decided by heroic struggle than by a legal battle before a judge." To this we may well add "or before an arbitrator," for the author goes on: "Settling (of the dispute) or mediation was the aim they were trying to achieve," a sentence that seems to contradict the assertion of many writers that the Egyptians had a preference for "a battle before a judge." Kees quotes an ancient myth according to which Geb, the "hereditary prince of the gods," *arbitrated* between the gods Horus and Seth in the "Hall of Notabilities." In that same place a dispute between the gods Seth and Osiris was also *arbitrated*. The conflict had arisen about the priority of the first-born son and the award was based upon the testimony of Thot, the god of justice, also called "the master of law" or "he who decides without being partial."¹ It is interesting to note that the proceedings of this mythical hearing are described as being similar to those of any earthly case of arbitration.

1. Hermann Kees, *Kulturgeschichte des alten Orients (Egypt)*, in *Handbuch der Altertumswissenschaft*, vol. 3, part 1, div. 3, p. 218.

While these examples show that arbitration must have been one of the oldest traditions in Egypt, only very few written records of its practice can be found in the three thousand years that started with the regime of the first king, Menes, and ended with the conquest of Egypt by the Persians. Some archaeologists and historians explain this lack of records with the theory that the autocratic rule of the Pharaohs with its overdeveloped bureaucracy was not favorable for such a democratic institution as the submitting of conflicts to the decision of fellow citizens. Yet, as the few surviving records show plainly that arbitration must have been a commonly used method of settling conflicts, it seems logical to suppose that arbitration was frequently used but its records are missing.

One of the possible reasons for this lack of records is that the archaeologists who excavated in Egypt were mainly interested in finding tombs and monuments of Pharaohs, princes and other exalted people, in which precious treasures of art could be found. The other might be that the inscriptions in tombs and on monuments, as well as on the papyrus-sheets that cover the mummies, are always concerned with the recording of the lives and deeds of the elite, but never with those of the simple people. We must also remember that even as late as in the eighth century A.D. illiteracy was the rule and people needed a scribe in order to state their case in a litigation, an expense which only the wealthy could afford.

The writer submitted this theory to one of the world's foremost experts, Professor Mariano San Nicoló, whose answer will be quoted on one of the following pages.

* * *

In preliterate times the Egyptians, a people of unknown origin, lived in two different realms, those of Upper and Lower Egypt. Originally the mother had been the head of the family (matriarchate), but later the father took over and it was he who arbitrated in disputes of his kin. The next step in the formation of society was the union of larger groups of neighbors into local communities, tied together by common interests, out of which grew the so-called "nomes." Still in preliterate times these district-groups merged into Confederations of the Nomes, adopting one common god instead of the several individual protecting deities of each of the nomes.²

The cultural level of the Egyptians reached a high standard

2. Jacques Pirenne, *Histoire des institutions et du droit privé de l'ancienne Egypte des origines à la fin de la IV^{me} dynastie*, vol. I (1932), p. 172.

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so early that they had introduced the solar calendar in the third millennium B.C. and their art had achieved incomparable masterworks. When Menes, the ruler of Southern Egypt, conquered the North and with it the important Delta of the Nile in about 2900 B.C., he put an end to the regime of the chiefs of the nomes and brought with him a new legislation dominated by the god Thot. The priests gained more and more importance and during the IVth dynasty the Vizirs (to use a modern expression: the prime-ministers) of the Pharaohs were mostly priests. During the Vth dynasty the administration underwent a reform, and the chiefs of the nomes acted also as presidents of the tribunals in their districts.³

During the three thousand years of the Pharaohs' rule many radical changes characterized the individual periods, but the basic principles and methods of their juridical system remained always the same. Nor were they altered by Persian, Byzantine, Greek and Roman conquerors, although they introduced an alien spirit and new ideas, religion and culture. For instance: all through the history of Egypt the officials of the state, the priests and the heads of smaller communities acted at times as judges and the highest instance remained always the Vizir, who functioned also as the head of all the departments of the administration. Under the Pharaohs one of his titles was "the chief of the six great houses," meaning the courts of justice. He held daily audiences every morning in the "Hall of Justice" and his decisions were preserved in files.⁴

All over the country lesser officials performed the same activity as judges or as foremen of juries. But in some instances they delegated one or more persons to act as arbitrators in a case. (We may question their having been arbitrators, as one of the main criteria, the *free choice* of the person to whom a dispute is voluntarily submitted is not present if the person is delegated by an authority.) This system remained always the same, whether the judge-officials were called strategos, epistrategos, diokete, laokrite, chrematiste, lashane, pagarch, etc. Their awards, or verdicts, must not have been final, for we know of many cases in which those rendered by juries or by judges, called by some authors "arbitrators," were submitted yet a higher level. In other cases the awards were sometimes submitted to tribunals or high officials for enforcement only, as is also done nowadays in certain cases.

3. *Ibid.*

4. James H. Breasted, *A History of Egypt from the Earliest Time to the Persian Conquest* (1912), pp. 241-42.

Here are the few records of arbitrations that we could find from the period of the Pharaohs: under Ramses II a dispute concerning the ownership of some property belonging to the temple of Mut in Karnak was decided by eight priests, with the high-priest of Amun acting as a foreman. The protocol was recorded by the scribe of the city-council. A second case comes from the reign of Ramses IX and deals with a litigation between high officials who had accused each other of having robbed a tomb. The Vizir himself presided over a board which consisted of the two most respected priests of Amun, the mayor and four city officials, of whom two had military rank.⁵

While these two cases are not quite clear and could also be interpreted as actions by juries or tribunals, here are two examples of undoubted and convincing cases of arbitration. The first of them was found engraved upon a stela and had been written in about 2500 B.C. under Khefren of the IVth dynasty. In this record the "heri djadja Nekheb" (the grand chief of Nekheb) sets up a trust fund in order to provide funeral offerings after his death, according to the custom of the country. He entrusts with the fulfillment of his dispositions a college of priests, and stipulates that possible future disputes between a priest and a layman should be submitted to the "seru" (the regular tribunal). But any future controversy between priests must be submitted to fellow-members of the college *acting as arbitrators*.⁶

The second record of an arbitration comes from about 2300 B.C., the period of the Vth dynasty, and is also concerned with the establishing of a funeral trust fund, by a man called Senu-ankh. It stipulates that in case of a future dispute between the trustees the share of the one whom the award will declare the loser must be given to the winner of the case, and the former will also be deprived of his membership on the trust fund's board.⁷

After a long and scrupulous research failed to find more arbitration cases from the Egypt of the Pharaohs, the writer decided to ask Professor San Nicoló, one of the world's greatest experts in the legal history of ancient times, whether he could indicate more examples and submitted to him also our theory regarding the reason for the lack of records. He replied from Munich with a very interesting letter, parts of which will follow here, translated from German,

5. Hermann Kees, n. 1, p. 221.

6. Jacques Pirenne, n. 2, p. 176.

7. *Ibid.*, p. 178.

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having been authorized by Professor San Nicoló. (The italics correspond to the words which were underlined in the letter.)

"In my opinion arbitration is an ancient institution which we meet *everywhere*; yes, arbitration agreement and award can be considered in many law-systems beside the authority of the state, as a *starting point* for an official legal procedure that was to develop *only later*. Of course, distinction must be made in practice between arbitrations in private and public matters. The latter were more frequently conserved and transmitted to us than those between parties in private disputes, as they had been of greater importance, which can be easily understood. A proof of this fact are the examples found by you, to which I cannot, unfortunately, add any others. Submission to arbitration in private matters had not been judged worth recording in those most ancient times when the knowledge of writing had been limited to very few people; they were recorded only later when literacy became more general. As a matter of fact, there already existed at that time a regular *juridical* procedure of the state, *at the side* of which, or as a *part of which*, arbitration is present. I believe that the first arbitrations had a divine character and that the king rendered his awards as a representative of the deity. A reminder of this was to survive as the 'judgment of God' (ordeal)."

* * *

The invasion by the Persians in 342 B.C. put an end to the government of Egypt by her own kings, and when the Ptolemies ruled over the country (in the second century A.D.) Christianity spread over it as well as over the Near East. New Greek cities were founded in Egypt, old ones were recolonized and transformed. This Hellenistic period lasted from the death of Alexander the Great in 323 B.C. till the conquest of Egypt by the Romans in 30 A.D., when with the suicide of Cleopatra the last of the Ptolemies disappeared. Culture, science and arts had been blossoming under their regime, when the Hellenistic culture had shifted to Alexandria: Zeno had founded the Stoic school in Egypt, Epicurus the Athenian school and it was there that Archimedes had discovered in the late third century the first principles of differential calculus. In the second century B.C. Egypt became also the classical land of astrological research, which popularized the Egypto-Chaldean astrology of the Persian period.⁸

8. William Foxwell Albright, From Stone Age to Christianity, pp. 261-63.

Records of very advanced procedure of arbitration survive from those periods, as well as others of dubious character. According to Taubenschlag the "epistrategos," a kind of district governor, acted as a single judge, but had no jurisdiction in civil cases. The "strategos" co-operated in preliminary proceedings for the courts and "acted as an arbitrator" in civil cases, yet without the power of issuing injunctions. The "epistalagos" gained some competence in certain acts of voluntary jurisdiction and acted either "as an arbitrator" or as a deputy of the prefect, mostly in civil cases.⁹

The documents of the late Byzantine period were mostly written in Greek, but by Coptic scribes. The "pagarch" was the highest official of the Arabic hierarchy of that period in Egypt, and he acted sometimes as an expert appraiser or conciliator, if the parties had in advance accepted his award as final. The "lashane" functioned also sometimes in similar manner. The council of the "great" or the "elders," called also "older sons," was of Byzantine origin. They were elected by administration officials or by the parties themselves, in a part of the procedure which was directed by the administration organization. This council listened to the explanations and arguments of both parties and rendered the award. Expert officials, leaders of community and church, were members of these tribunals.¹⁰

Several examples of such un-orthodox arbitration proceedings can be found in the Oxyrynchus Papyri from 427 A.D., which contain mostly records of legal actions of the Apion family, of which we shall quote a typical one: "The year after the consulship of our masters Theodosius for the twelfth time and Valentianus for the second time, the eternal Augusti, Phamenoth I.—To the officium of the princeps, my lord the most magnificent prefect of the province, Fl. Demetrianus Maximus, with the co-operation of Paul, the singularis, Aurelius Cyrus, son of Leontinus, a trader of the metropolis Alexandria, now doing business in the illustrious city of Oxyrynchus.

"I approached his said eminence by presenting a libellus or petition, in which I accused Nestorius, son of Nestorius, also an Alexandrian trader, for debt; and since he has been brought forward and has given me satisfaction, I now have no claim against him, nor do, nor will I, accuse him on this account, by which I agree swear—

9. Raphael Taubenschlag, *The Law of Greco-Roman Egypt in the Light of the Papyri* (1944), pp. 372-73; cp. also Josef Modrzejewski, *Private Arbitration in the Law of Greco-Roman Egypt*, *Journal of Juristic Papyrology*, vol. 6, p. 239-256 (Warsaw 1952).

10. A. Arthur Schiller, *Coptic Documents* (Padua 1933), pp. 23-24.

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ing by the God the Almighty and the piety of our all-conquering masters Theodosius and Valentianus, the eternal Augusti, to abide by all that is herein written and in no wise transgress it; and for security I have made this acquittance and in answer to formal questions gave my consent."¹¹

The document, which is signed by Cyrus, reports to the prefect the acceptance of the award as final. The fact that a trader had been chosen to sit with the single judge in the case of fellow traders bears resemblance to our modern arbitration boards, which offer the parties a panel of experts in their trade.

As everywhere and always, arbitration was used regularly for deciding controversies arising from the division of properties and legacies. The "Antiopulos and Syene Papyri," also of the Byzantine period, which are today partly in London and partly in Munich, are dated from 583 A.D. and contain many such cases. Here is an example of a "dialysis" (a document which closes a dispute with final validity) of a family feud about the estate of a man by the name of Jakybis, which was to be distributed between Aurelios Johannes and his daughter, Aurelia Kako, who was represented at the hearing by her husband, Aurelius Patermouthis. It says:

"Johannes attacked Patermouthis because of a part of a house, which the latter had bought from a third party, but it looked as if he had resold it to his father-in-law; and also because of half of the value of a ploion (freight boat) which Patermouthis had bought from his father-in-law, as he, Johannes, believed them to be part of the inheritance.

"After much feuding, the two parties arrived at a settlement through *private arbitration*, which gave Johannes half of the boat (one quarter as his share in the inheritance and one quarter as a result of the settlement), while Patermouthis and Aurelia Kako will keep the other half, and Johannes will renounce his share of the house and also give up any claim to the golden necklace belonging to the daughter of Patermouthis."¹²

Although the awards of arbitrators were to be accepted as final, some of the Syene Papyri, which were found on the Elephantine island of the Nile near Assuan, show several instances in which

11. B. P. Grenfell, Arthur S. Hunt and H. J. Bell, *The Oxyrynchus Papyri*, Part XVI (London 1924), p. 79.

12. August Heisenberger and Leopold Wenger, in *Veroeffentlichungen aus der Koeniglichen Hof-und Staatsbibliothek zu Muenchen*, I. *Byzantinische Papyri*, p. 79.

the members of the ever-quarreling family of Johannes and Patermouthis broke their pledge and submitted decided cases again to a tribunal, but the party which had broken the agreement and disregarded the decision of the arbitrator was fined. The "dialysis" mostly stipulated such penalties in advance. We find that the sons of Patermouthis and Johannes submitted the once decided litigation, notwithstanding its final award, to a second arbitration by Seren, the priest of the holy church of Omboi, who was by chance present at Syene at that time.¹³

In the middle of the seventh century A.D. the Mohammedans took Egypt from the Byzantine emperors, but the Christian Copts were in majority over the Arabs and retained their social and political autonomy, except when conflicting with their rulers.¹⁴ A great amount of Coptic documents from the second half of the eighth century A.D. were found in an ancient chest among the ruins of the cloister of Apa Phoibammon, near Djeme (or Jeme, according to the English spelling), which had been the records of an archive. Many of them are concerned with a family's legal transactions and litigations that lasted for generations and were frequently decided by arbitration. One of the records quotes four heirs of a man by the name of Germanos who write to the priest Shenute, also an heir:

"We fought each other before the most famous comes, dioketes (administration officials) of the castron (district) of Jeme, about the house in Kuelol Street, that is to be divided according to the order of our master. After much altercation before the diokete, he made a proposal with which we all agreed: *we elected arbitrators* from the castron and the diokete sent them into the house and they made the division."¹⁵

More interesting arbitration cases were described and translated by A. Arthur Schiller, who was kind enough to let us read his thesis for his master's degree, written in 1926, which has for its topic the legal transactions of a family in Jeme, between 741 and 756 A.D. One of them says, after the customary introduction:

"I, Abessa, daughter of the blessed Zacharias, her mother being Abegea, inhabitant of the castron Jeme, the district of the city of Hermonthos; I give below a notary, who shall subscribe for me this

13. *Ibid.*

14. A. Arthur Schiller, A Coptic Dialysis, *Revue d'histoire du droit*, vol. VII, p. 422.

15. W. E. Crum and G. Steindorff, *Koptische Rechtsurkunden aus Djeme* (translated by Revillout in *Précis du droit égyptien*), pp. 835-37.

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dialysis-document, a partition and contractual agreement, inviolable and unimpeachable, according to the laws. I augment the validity of it by trustworthy witnesses who shall witness it at my request.

"For at one time, now the eighth year, we litigated amongst ourselves about the house of our blessed father Zacharias, this which faces the house of Andreas, the son of Sikeintos, so that we should divide it amongst us, each becoming the master of his portion. After a great deal of controversy, which occurred between us, we selected elders (great men) and the appraiser of the castron. We led them into the house, they intervened and laid down the inheritance of all that house, the share going to me and that to you.

"... Whoever close or far relative would dare to act against the possession shall be estranged from the Father, the Son and the Holy Ghost, and shall pay 36 gold-holocattini as penalty to the power that acts at that time."¹⁶

Professor Schiller published a new version of his thesis in 1952 with slightly changed translation of the texts. One of the later cases from 739 A.D., that of Tsherkah, the daughter of Abessa, was submitted to Johannes, the diokete, who must have ordered that the parties elect arbitrators, for the document says: "It was adjudged between us, justly, by other honorable and expert persons of the castron . . . and it was satisfactory to us, as stated."¹⁷

Many of the awards are signed for the parties, mentioning that they are illiterate, by the scribes. As we have said before, the lack of knowledge of writing and the need of employing expensive scribes might have been one of the main reasons for the fact that records of arbitrations are missing through almost all the history of Egypt. Yet here we have an evidently well-to-do family, the members of which returned to arbitration for generations in order to settle their litigations. This might well be considered a valid proof of the fact that the practice of arbitration must have been a part of the traditions that remained alive in Egypt.

16. A. Arthur Schiller, *Legal Transactions of the Family of Georgios and Abessa of Djeme in Upper Egypt in the Eighth Century A.D.*, a typed J.D. dissertation, University of California (1926).

17. A. Arthur Schiller, *A Family Archive from Jeme*, *Studi in Onore di Vincenzo Arangio-Ruiz*, Vol. IV (Naples, 1952), pp. 327-375, at p. 352.

REVIEW OF COURT DECISIONS

THIS review covers decisions in civil, commercial and labor-management cases, arranged under six headings: I. *The Arbitration Clause*, II. *The Arbitrable Issue*, III. *The Enforcement of Arbitration Agreements*, IV. *The Arbitrator*, V. *The Proceedings*, VI. *The Award*.

I. THE ARBITRATION CLAUSE

COURT DIRECTS ARBITRATION, REJECTING CONTENTION THAT PROVISION FOR ARBITRATION IS "PERMISSIVE ONLY." Said the court: "The permissive feature of the arbitration provision relates to the privilege of either party to request arbitration. Once arbitration is requested, the other party is bound." *Clifford Concession Co. v. Hotel Front Service Employees*, N.Y.L.J., July 8, 1957, p. 4, Conlon, J.

OHIO COURT OF APPEALS HOLDS ARBITRATION CLAUSE BINDING, reversing lower court ruling that right to litigate in court is "inalienable and cannot be bargained away." A contract between a contractor and an air-conditioning sub-contractor for a plant of the Atomic Energy Commission in Ohio provided for arbitration of disputes before the contractor's general manager. A claim by the sub-contractor was disallowed by the arbitrator and no appeal was then taken to the Atomic Energy Commission, also provided for in the contract. Instead, the claimant instituted action before the Common Pleas Court of Pike County. The court permitted this action, saying that the right to litigate is "one of those rights which is, in its nature, under our Constitution, inalienable and can not be bargained away." The Court of Appeals of Pike County reversed the lower court, ruling: "The effect of this is to say that such a provision [for arbitration] in a contract is not binding on the parties. With this position we are unable to agree." In referring to various decisions of the Supreme Court of Ohio, especially *Brennan v. Brennan*, 164 Ohio Stat. 29, 128 N.E. 2d 89 (digested in *Arb. J.* 1955, p. 217), and to Sec. 2711.01 of the Revised Code providing for the enforcement of future arbitration clauses, the court said: "Dressler does not claim fraud or bad faith on the part of the arbitrator, and he proceeded under the disputes clause of the contract until he received an adverse decision by the arbitrator. As we understand the law of arbitration, as established by the Supreme Court of Ohio, Dressler was bound by such provision of the contract and may not, after receiving an adverse decision in the arbitration proceedings, resort to a court of law to have his rights under the contract determined." *Dressler v. Peter Kiewit Sons' Co.*, 102 Ohio App. 503 (Collier, J.).

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DEATH OF A PARTNER DOES NOT TERMINATE ARBITRATION AGREEMENT inasmuch as arbitration is a special proceeding (Sec. 1459 C.P.A.) and such proceeding "does not abate by any event if the right to the relief sought in such special proceeding survives or continues" (Sec. 82 C.P.A.). On the partner's death, which dissolved the partnership by operation of law (Sec. 62(4) Partnership Law), the right of the deceased in any specific partnership property, which would include damage claims to be arbitrated, became vested in the surviving partners (Sec. 51(2)(d) Part. L.). Arbitration was therefore properly had, as determined by the Appellate Division. A motion for leave to appeal was dismissed by the Court of Appeals "upon the ground that the order sought to be appealed from does not finally determine the proceeding within the meaning of the Constitution." *First National Oil Corp. v. Arrieta*, 2 N.Y. 2d 992, 163 N.Y.S. 2d 604.

AN ARBITRATION CLAUSE WHICH PERMITTED ONE SIDE BUT NOT THE OTHER TO INVOKE ARBITRATION WAS HELD UNENFORCEABLE "FOR LACK OF MUTUALITY OF OBLIGATION." A carpet cleaning company's receipt for rugs provided for arbitration of a customer's claim of negligence, but gave the company the option to litigate in court its claim for money due. This, the court said, could not be deemed a binding agreement to arbitrate. *Deutsch v. Long Island Carpet Cleaning Co.*, 5 Misc. 2d 684 (App. Term, First Dept.).

SALES AGENT FOR A NAMED COMPANY CANNOT COMPEL A BUYER TO ARBITRATE WHERE THE PRINCIPAL HAD AUTHORIZED ONLY THE SALES TRANSACTION AND NOT AN ARBITRATION AGREEMENT, the court holding that arbitration would be inappropriate where the principal would not necessarily be bound by the award. Moreover, the court could not imply authority of a selling agent to institute arbitration for payment of merchandise when buyer claimed breach of warranty. However, a triable issue was presented whether the agent acted within the scope of his authority when making the arbitration agreement, or if not, whether estoppel operated when the agent was authorized to participate in arbitration proceedings on behalf of the principal. *Eimco Corp. v. Deering, Milliken & Co.*, 163 N.Y.S. 2d 273 (Matthew M. Levy, J.).

CORPORATION OFFICERS AS INDIVIDUALS ARE NOT BOUND TO ARBITRATE WITH A THIRD PARTY, despite the fact that they received services from that party with whom they signed an employment contract on behalf of the corporation. Said the court: "Such circumstances in and of themselves do not establish an agreement upon the part of the officers to submit to arbitration as individuals upon issues arising out of the contract here involved . . . It may be that the transactions referred to give rise to liabilities which may justify appropriate legal action against the persons in question by way of suits instituted in the courts but they do not entitle petitioner to the specific relief here sought." A motion to compel arbitration against the individuals was therefore denied. *Schwartz v. Kaunitz*, N.Y.L.J., July 16, 1957, p. 3, McGivern, J.

DISPUTE BETWEEN A SALES AGENCY AND A CORPORATION OVER SALE OF THE LATTER'S PRODUCT IS NOT ARBITRABLE DESPITE FACT THAT PARTNERS OF THE SALES AGENCY ARE ALSO STOCKHOLDERS OF THE CORPORATION. Though the agreement between the corporation and the partners, as individuals, contained an arbitration clause, the court held that the dispute was not between the corporation and the individuals but between the corporation and the sales agency, and said: "The mere fact that the partners conducting the sales agency happen to be stockholders of the corporation cannot in and of itself make the arbitration clause to apply to them." *Wolovsky v. Landsman*, N.Y.L.J., August 7, 1957, p. 2, McGivern, J.

II. THE ARBITRABLE ISSUE

DISPUTE OVER RIGHT OF A PARENT TO VISIT A CHILD IS NOT ARBITRABLE. Said the court: "Either custody or visitation is a matter involving the well-being of a child. This well-being is not only the primary object of parents, as was recognized by the parties to the agreement *sub judice*, but is also a primary interest to the State acting as a corporate body. Since it is well known that arbitrators need not follow the law in their considerations and awards, the courts of this State have in certain situations involving public policy set aside awards in conflict with such policy." *Michelman v. Michelman*, 5 Misc. 2d 570 (Samuel M. Gold, J.).

ACTION OVER DAMAGES, ALLOWANCES AND AMOUNTS DUE TO BUILDING CONTRACTOR STAYED PENDING ARBITRATION, the court holding that an architect's determination under the construction contract was conclusive only on matters expressly mentioned, such as interpretation of drawings and quality of work required. Other disputes, under the contract, were to be considered by the architect but his determination was not to be final but appealable in arbitration under the General Conditions of the American Institute of Architects. *Rosato v. Goldpure, Inc.*, N.Y.L.J., May 15, 1957, p. 9, McDonald, J.

DISPUTE OVER WHETHER EMPLOYEE "LEFT THE EMPLOYER'S EMPLOY" OR WAS DISCHARGED IS ARBITRABLE, the court holding that whether employee is seeking reinstatement or is protesting a discharge is an "equivocation." The employee was arrested for theft of the company's products but was later acquitted by a jury. The company resisted arbitration on the ground that the arbitration clause covered disputes over "just cause" for discharge, not attempts by employees who quit to obtain reinstatement. The court denied a motion to stay arbitration, saying: "Petitioner has also contended that respondent is seeking arbitration not with respect to the discharge of the employee, but rather to compel his reinstatement. Actually, of course, the reinstatement of a discharged employee is probably the prime purpose behind every arbitration of a discharge. It is equivocation to say that they are seeking arbitration of reinstatement, rather than of discharge." *Roto Supply Sales Co. v. Dist. 65, Retail, Wholesale and Department Store Union*, N.Y.L.J., June 19, 1957, p. 11, Pette, J.

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DISPUTE OVER UPGRADING OF JUNIOR EMPLOYEE IN PREFERENCE TO ANOTHER WITH GREATER SENIORITY IS ARBITRABLE DESPITE FACT THAT COURT WOULD DOUBTLESS UPHOLD THE COMPANY'S INTERPRETATION OF THE CONTRACT ON THE MERITS OF THE CONTROVERSY. Said the court: "To avoid arbitration under a contract, there apparently must be found a clear and explicit exemption of a precisely defined issue. Absent such precision, language that may have been intended to eliminate arbitration will not be so construed. This may work hardship on a company where, as in this case, it seeks to control the operation of a delicate process but recently developed by using employees it finds best suited." *Carey (Pres., IUE, AFL-CIO) v. General Electric Co.*, N.Y.L.J., June 18, 1957, p. 6, Nathan, J.

CLAIM FOR DAMAGES BASED ON ALLEGED FRAUD IN INDUCING CONTRACT IS NOT ARBITRABLE WHERE CLAIMANT DID NOT SEEK TO RESCIND THE CONTRACT BUT ELECTED RATHER TO AFFIRM THE CONTRACT AND DERIVE A BENEFIT FROM ITS TERMS. Under a distributor's franchise agreement providing for arbitration of any question "as to the validity, interpretation or performance of this agreement," the distributor asked, among other things, for arbitration of "damages for breach of contract arising from fraud and misrepresentation inducing claimant to enter into the contract." The claim based upon the alleged fraud and misrepresentation leading to the formation of the agreement was not considered an arbitrable issue under the arbitration clause, inasmuch as the distributor did not seek rescission of the contract but elected to affirm the contract and based his contention upon its binding force. The court, considering the claim not to arise out of the "breach of contract," as used in the wording of the Demand for Arbitration, said: "Those words are manifestly inadvertent and ineffectual, inasmuch as damages for breach of a contract could not possibly arise from inducing the party claiming them to enter into the contract by fraud . . . Loss sustainable in carrying out a bad bargain is different from damages arising from its breach by the opposite party." In reversing decisions which denied a motion to stay arbitration, a majority of four to three of the Court of Appeals stayed the arbitration of that claim in saying: "No question of validity of the contract is at stake inasmuch as Plotnick has chosen to stand upon the agreement and does not seek rescission. Even if he had rescinded or asked for rescission, such an issue would have had to have been decided in court before it could be known that an agreement existed supplying a foundation for the jurisdiction of the arbitrators. No question is raised concerning its interpretation or nonperformance." *Wrap-Vertiser Corp. v. Plotnick*, 3 N.Y. 2d 17, 163 N.Y.S. 2d 639 (Van Voorhis, J.).

COURT STAYS ACTION AGAINST INDIVIDUALS FOR MISMANAGEMENT AND WILLFUL WASTE OF CORPORATE ASSETS, the court holding this dispute is arbitrable under a stockholders' agreement providing for arbitration "of differences between them in the conduct and operation of the business of the corporations." *Friedman v. Bernard*, N.Y.L.J., July 25, 1957, p. 2, McGivern, J.

DISPUTE OVER RIGHT OF A COMPANY TO EMPLOY A NON-UNION SALESPERSON IN ONE OF ITS RETAIL SHOPS IS ARBITRABLE under a collective bargaining agreement providing not only for arbitration of disputes on interpretation and application of any clause of or matter covered by the agreement, but also "any act or conduct or relation between the parties hereto, directly or indirectly." A motion to stay arbitration was therefore denied. *Genuth v. Spaulding Bakeries*, N.Y.L.J., July 3, 1957, p. 3, Lupiano, J.

QUESTION OF WHETHER THERE WAS COLLUSION BETWEEN UNION AND EMPLOYER TO BRING ABOUT DISCHARGE OF AN EMPLOYEE MAY BE DETERMINED IN COURT despite the fact that an award on whether there was just cause for discharge is binding, inasmuch as the question of collusion was neither covered by the collective bargaining agreement nor submitted for consideration to the arbitrator. *Liquor Salesmen's Union of the State of N. Y., Local No. 2, AFL-CIO v. Alpine Wine & Liquor Corp.*, N.Y.L.J., August 13, 1957, p. 2, Spector, J.

COURT WILL NOT DIRECT ARBITRATION OF DISPUTE OVER HOLIDAY PAY where employees were absent from work due to death in the family during week in which holiday occurred. The collective bargaining agreement expressly required work without absence during that week as a condition precedent for holiday pay. The court held that although the dispute might fall within the literal language of the arbitration clause, it was not arbitrable where there was "no real ground of claim." *Carey (Pres., IUE, AFL-CIO) v. General Electric Co.*, N.Y.L.J., June 18, 1957, p. 6, Nathan, J.

III. THE ENFORCEMENT OF ARBITRATION AGREEMENTS

COURT WILL NOT DIRECT ARBITRATION OF CLAIM BY GENERAL AGENT AGAINST A DEFUNCT INSURANCE COMPANY FOR COMMISSIONS ON POLICIES CANCELLED PRO RATA, where the Superintendent of Insurance, as liquidator of the company (Preferred Accident Insurance Company) was obliged by Art. XVI of the Insurance Law to grant equitable treatment for all creditors and where the law provides for a single, integrated administration of all matters affecting assets available for distribution. A decision by a lower court which granted the agent's motion to stay court action was reversed, inasmuch as arbitration of the claim "would reduce the size of the fund and might jeopardize the parity of participation in the fund." *Knickerbocker Agency v. Holz*, 4 A. D. 2d 71, 162 N.Y.S. 2d 822 (First Dept., Rabin, J.).

COURT WILL NOT STAY ACTION OVER DISSOLUTION OF CORPORATION DESPITE ARBITRATION CLAUSE IN STOCKHOLDER AGREEMENT where that clause limits arbitration to "such liquidation and dissolution" as would result from the non-acceptance of an offer by one of the parties to the agreement to sell his entire stock interest to the others. *In re Benreal Corp.*, N.Y.L.J., July 15, 1957, p. 2, Flynn, J.

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COURT WILL NOT DIRECT ARBITRATION OF DISPUTE OVER ACCOUNTING OF ASSETS OF A DECEASED PARTNER'S ESTATE where one of the parties to the dispute was a minor son of the deceased, the court referring to *Swislocki v. Spiewak*, 273 App. Div. 768, 75 N.Y.S. 2d 147. *Kabinoff v. Kabinoff*, 163 N.Y.S. 2d 798 (McDonald, J.).

ARBITRATION OF DISPUTE OVER "EXTRAS" IN CONSTRUCTION CONTRACT WILL NOT BE DIRECTED where contract expressly provided for owner's written authorization for changes in work and claims of extras and where contractor undisputedly failed to obtain such written authorization. *Connecticut Mutual Life Ins. Co. v. Allwyn Cont. Co.*, N.Y.L.J., August 13, 1957, p. 2, Spector, J.

COURT WILL NOT CONSIDER MERITS OF CONTROVERSY, LEAVING THE QUESTION OF PERFORMANCE OF A CONTRACT TO ARBITRATION IN ACCORDANCE WITH PROVISION IN THE AGREEMENT. Said the court: "On a motion to compel arbitration or to stay such arbitration the court is not authorized to consider the merits of the controversy. The only pertinent questions to be determined by the court are (1) whether there is in fact a dispute; (2) whether there is a contract to arbitrate; and (3) whether there is a refusal to arbitrate (*Matter of Crosett*, 275 App. Div. 1051). Every other issue in the proceeding, whether of fact or law and whether raised by denial or defense, is for the arbitrator (*Matter of Lipman*, 263 App. Div. 880, aff'd 289 N.Y. 76; *Matter of Kahn*, 284 N.Y. 515)." *Bichler v. 100 Lexington Ave. Corp.*, N.Y.L.J., July 26, 1957, p. 4, Herzka, J.

COURT WILL NOT STAY ACTION WHERE DISPUTE, ARISING OUT OF SALES TRANSACTION, OCCURRED AFTER CANCELLATION OF CONTRACT. *Pan Am. Trade Development Corp. v. Bertsch*, N.Y.L.J., August 21, 1957, p. 3, Spector, J.

COURT CONFIRMS ORDER DIRECTING ARBITRATION TO DETERMINE WHETHER "LIFTING" BY A SHIPOWNER OF LESS THAN THE 2,500,000 BOARD FEET OF LUMBER REQUIRED BY A CHARTER PARTY AGREEMENT CONSTITUTED BREACH OF CONTRACT. In unanimously confirming the decision below (see *Arb. J.* 1957, p. 115), the court quoted from the recent New York decision in *Burkin v. Katz*, 3 A.D. 2d 238, 160 N.Y.S. 2d 159: "Arbitration is subject to its own rules and practices at variance with court procedures. It is supposed to be a complete proceeding, without resort to court facilities, for handling and disposing of a controversy submitted to arbitration. It would be generally incompatible with the nature and scope of an arbitration proceeding to allow a shift to the court forum of that part of a proceeding relating to the pre-hearing examination of witnesses or collection of evidence." *Compania Panemena Maritima San Gerassimo, S.A. v. J. E. Hurley Lumber Co.*, 244 F. 2d 286 (Second Cir., Leibell, D. J.).

ACTION BY EMPLOYER FOR DECLARATORY JUDGMENT THAT EMPLOYER'S NOTICE EFFECTIVELY TERMINATED INDIVIDUAL EMPLOYMENT CONTRACT CANNOT BE STAYED BY UNION ASSERTING ARBITRATION CLAUSE, the court holding that the only way to take advantage of the arbitration clause is through a motion to compel arbitration. *John Reber Baking Corp. v. Urbach*, N.Y.L.J., June 24, 1957, p. 4, Conlon, J.

COURT WILL NOT STAY ARBITRATION PENDING ACTION FOR RESCISSION OF CONTRACT BASED ON THE ALLEGATION, AMONG OTHERS, THAT AN AGREEMENT BARRING ONE PARTY FROM COMPETING WITHIN A 15-MILE RADIUS OF A CITY FOR FIVE YEARS WAS IN "RESTRAINT OF TRADE." A court order denying a stay of arbitration on that basis was unanimously affirmed. *Costanzi v. Costanzi*, 3 A.D. 2d 921, 163 N.Y.S. 2d 950.

COURT DIRECTS MEMBERS OF THE DIAMOND TRADE ASSOCIATION OF AMERICA, INC. TO ARBITRATE DISPUTES under the machinery set up by their organization for that purpose. In denying a motion of a member to restrain another member from proceeding with a proposed arbitration appeal, the court said: "The parties, having selected their own method of determining their dispute, are bound by the methods and procedure of the association whose manner of arbitration they have agreed to abide by. Since the appeal is provided for by the by-laws and regulations of the association, any decision or award may be acted upon by such tribunal in accordance with such by-laws." *Gutchen v. Dembitzer*, 4 Misc. 2d 650 (Dineen, J.), affirmed (without opinion) 285 App. Div. 928.

COURT DIRECTS ARBITRATION OF DISPUTE OVER HIRING OF INDEPENDENT TRUCKMEN DESPITE FACT THAT, TWO DAYS AFTER INSTITUTING ARBITRATION PROCEEDINGS, UNION FILED UNFAIR LABOR CHARGES WITH NLRB ON WHAT COMPANY REGARDED AS THE SAME ISSUES. The court held that NLRB action does not constitute a waiver of arbitration inasmuch as the National Labor Relations Board has no jurisdiction over breaches of collective bargaining agreements such as contained in the union's demand for arbitration. *Local Union No. 138, Internat. Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO v. Embassy Grocery Corp.*, N.Y.L.J., June 19, 1957, p. 6, Nathan, J.

ARBITRATION CLAUSE IN AUTOMOBILE INSURANCE POLICY WHICH COVERS RELATIVES OF THE INSURED IS NOT APPLICABLE TO AN INFANT where the policy provides that "terms of this contract which are in conflict with the statutes . . . are hereby amended to conform to such statutes," and where sec. 1448(1) C.P.A. bars arbitration of controversies involving infants. This case resulted from an accident between an insured vehicle and an uninsured motorist, in which two parents and two minor children were injured. Under the "family protection provision"

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of the policy, the two adults proceeded to arbitration under AAA rules, claiming compensation for their injuries. At the same time, an action at law was instituted in behalf of the two minors. The insurance company sought to stay the court action and compel arbitration. The court refused to do so, holding that the arbitration agreement in this respect is superseded by statute. *Benfante v. Commercial Ins. Co. of Newark*, 5 Misc. 2d 772, 162 N.Y.S. 2d 715 (Edward G. Baker, J.).

IV. THE ARBITRATOR

CONNECTICUT COURT DISQUALIFIES ARBITRATORS IN ADVANCE OF AWARD WHERE THEY FAILED TO DISQUALIFY THEMSELVES WHEN CHALLENGED BY ONE PARTY BECAUSE OF RELATIONSHIP WITH THE OTHER PARTY. Acting under Conn. General Statutes 1949, sec. 8154 empowering the court to appoint new arbitrators upon "inability" of original arbitrators to act, the court said: "The courts can set aside an award for the partiality and collusion of arbitrators; they should have the power to interrupt proceedings when, in a plenary action before an award, one of the parties can prove partiality and collusion in the arbitration proceedings. . . . The word 'inability' as used in the statute suggests a lack of power for any reason and embraces inability for legal reasons. If the court should enjoin the defendant arbitrators from acting, there would most certainly be an inability to serve, and the statute empowers the court to appoint new arbitrators." The court therefore remanded the case for appointment of new arbitrators. *Gaer Brothers v. Mott*, 144 Conn. 303, 130 A. 2d 804 (Conn. Supreme Ct. of Errors, Baldwin, Assoc. J.).

GEORGIA COURT UPHOLDS AWARD DESPITE PARTY'S CHALLENGE BASED UPON ALLEGED REMARK BY ARBITRATOR AFTER AWARD WAS RENDERED. A claim for use of right-of-way by a railroad was submitted to arbitrators appointed by the Atlanta Real Estate Board. The award for \$150 was confirmed, the Court of Appeals of Georgia saying: "A party dissatisfied with an award can not impeach it by some remark or remarks made by an arbitrator after the award has been rendered. See *Eberhardt v. Federal Ins. Co.*, 14 Ga. App. 340, 80 S.E. 856. This special ground is without merit." *Wood v. Western & Atlantic Railroad*, 97 S.E. 2d 556 (Ct. of Appeals of Georgia, Div. No. 2, Gardner, Presiding J.).

COURT WILL NOT APPOINT ARBITRATORS WHERE AGREEMENT OF PARTIES REFERS TO RULES OF THE AMERICAN ARBITRATION ASSOCIATION, the court holding its function is not to "narrow the field of arbitral disputes." Said the court: "If the contract for arbitration provides for a method of naming or appointing an arbitrator or arbitrators, such method shall be followed (sec. 1452 of the Civil Practice Act). It is not the duty of the court to narrow the field of arbitral disputes (*Wenger & Co. v. Proppter Silk Hosiery Mills*, 239 N.Y. 199, 202)." *North Am. Planning Corp. v. Ross*, N.Y.L.J., July 31, 1957, p. 2, Klein, J.

ARBITRATORS ARE IMMUNE FROM DAMAGE SUITS BASED UPON ALLEGED MISCONDUCT IN ARRIVING AT AWARDS. The decision of Special Term to that effect, digested in *Arb. J.* 1956, p. 57, was unanimously affirmed by the Appellate Division. *Babylon Milk & Cream Co. v. Horvitz*, N.Y.L.J., July 16, 1957, p. 5, App. Div., 2d Dept.

COURT DIRECTS PARTIES TO "SELECT THE ARBITRATORS IN THE MANNER PROVIDED BY THE RULES OF THE AMERICAN ARBITRATION ASSOCIATION," holding that a prior order of the court (*Arb. J.* 1957, p. 46) to proceed in accordance with the demand for arbitration was merely a determination that there was a triable issue. *Crowell-Collier Publishing Co. v. King-Size Publications*, N.Y.L.J., June 7, 1957, p. 7, Lupiano, J.

V. THE PROCEEDINGS

ARBITRATION BEFORE THE ARBITRATION COMMITTEE OF THE NATIONAL FEDERATION OF TEXTILES STAYED WHERE RESPONDENT'S PRESIDENT WAS ONE OF THREE IN CHARGE OF THE FEDERATION'S BUREAU ON ARBITRATION, despite fact that the party gave notice of his function when arbitration was demanded and he had disqualified himself as a member of the Arbitration Committee with respect to that controversy. The court added that if the parties elected, they could reach agreement "upon another tribunal or for the designation of an arbitrator by the court." *Brookfield Clothes v. Rosewood Fabrics*, N.Y.L.J., May 16, 1957, p. 6, Aurelio, J.

CONSULTATION BETWEEN ARBITRATORS AND COUNSEL FOR THE NATIONAL FEDERATION OF TEXTILES AS TO THE MEANING OF A COURT ORDER DID NOT CONSTITUTE MISCONDUCT, particularly as Rule 7 of the Federation expressly provides that "arbitrators may consult with counsel but shall not be bound by their opinion." Moreover, the parties to the arbitration were advised during hearings of such consultation and did not object at that time. The subject of consultation was whether a court order required a new arbitration or whether the arbitrators were directed to render a new award on the basis of previous hearings. The award was confirmed. *French Textiles Co. v. Brawer Bros. Silk Co.*, N.Y.L.J., August 8, 1957, p. 3, Boylan, J.

AWARD WILL NOT BE VACATED FOR THE REASON THAT THE ARBITRATOR HAD NOT TAKEN AN OATH, the court holding that "it is unnecessary to determine whether this is a statutory or common law arbitration. These objections are not grounds for the vacatur of an award." *Joseph F. Egan, Inc. v. Local Union No. 1, United Assoc. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the U. S. and Canada*, N.Y.L.J., July 11, 1957, p. 4, Fine, J.

REVIEW OF COURT DECISIONS

AWARD VACATED WHERE THERE WAS NO PROOF THAT COUNSEL FOR RESPONDENT HAD RECEIVED A LETTER FROM THE GENERAL ARBITRATION COUNCIL OF THE TEXTILE INDUSTRY INFORMING HIM THAT PETITIONER'S COUNSEL WAS ALSO COUNSEL FOR A COMPANY WHICH HAD, AS ONE OF ITS CHIEF OFFICERS, ONE OF THE ARBITRATORS. Court directed a rehearing before new arbitrators despite conviction that the arbitrator in question was in fact impartial, saying: "The close confidential relationship of counsel to client is deemed to create a disqualification based upon the nature of the relationship itself where, as in this case, petitioner and the company of one of the arbitrators are represented by the same attorneys. The situation was known to the counsel for the petitioner, the arbitrator, and the general arbitration council well in advance of the hearing. They were under a duty to disclose and to obtain a clear waiver or a new arbitrator. The isolated attempt to accomplish the former by sending notice by ordinary mail was well intentioned but ineffective." *Tillinghast-Stiles Co. v. M. Lahm Knitting Mills, N.Y.L.J.*, June 24, 1957, p. 4, Nathan, J.

REQUEST BY ONE ARBITRATOR THAT AGREED UPON COMPENSATION FOR ARBITRATORS BE INCREASED IN VIEW OF DIFFICULTY OF CASE DID NOT CONSTITUTE SUCH MISCONDUCT AS TO RESULT IN THEIR REMOVAL BEFORE THE AWARD WAS RENDERED, the Appellate Division affirming a Special Term order and holding that the question of misconduct by the arbitrator can only be determined on a motion to vacate the award. Said the court: "In its whole general scheme, article 84 of the Civil Practice Act, carefully circumscribes the conditions of judicial supervision of arbitration and of judicial interference with its processes. No general authority has been demonstrated for the relief sought on this motion 'disqualifying and removing' the arbitrators in the course of the proceedings and in advance of an award. The power of the court for relief against misconduct set up in the section on which the motion was based is plainly, by that statute, to be exercised by 'an order vacating the award.'" *Franks v. Penn-Uranium Corp.*, 4 A.D. 2d 39, 162 N.Y.S. 2d 685 (First Dept., Bergen, J.).

COURT WILL NOT STAY ARBITRATION BECAUSE OF ASSERTED VAGUENESS IN NOTICE OF ARBITRATION where such "notice given admittedly pursuant to the basic contract fairly appraises the plaintiff of the matters to be considered." *Local Union No. 167, Int'l Bro. of Teamsters v. Poultry Associates, N.Y.L.J.*, July 9, 1957, p. 2, Flynn, J.

VI. THE AWARD

AWARD CONFIRMED IN PART AND VACATED IN PART AS "IMPERFECTLY EXECUTED" where arbitrator awarded \$200 to building owner for bathroom fixtures which did not meet specifications but where arbitrator said he could not determine whether painting, which had been done four years earlier, was in accordance with contract. Submission to arbi-

tration had put both questions before the arbitrator. *Greer v. Lowe*, 94 So. 2d 560 (Ct. of Appeal of Louisiana, Second Cir., Gladney, J.).

LUMP-SUM AWARD UPHELD AS WITHIN ARBITRATOR'S AUTHORITY despite fact that contracts for sale of shares in telephone-answering service corporation provided for a price to be paid in installments, which installments would be subject to later adjustment for credits. Special Term refused to confirm the arbitration award as being "contrary to the deferred installment plan of the contract" (160 N.Y.S. 2d 109), but the decision was unanimously reversed, the higher court holding: "In construing the contract so as to determine that the adjustments were repayable by the sellers in cash, the arbitrators cannot be said to have 'exceeded their powers' (Civ. Prac. Act, § 1462. They acted well within the scope of the powers conferred upon them by the parties, and their award is unassailable." *Capelin v. Klein*, 3 A.D. 2d 995 (First Dept.).

AWARD BY TWO ARBITRATORS OF A TRI-PARTITE BOARD, IN THE ABSENCE OF ONE PARTY-APPOINTED ARBITRATOR WHO RESIGNED, VACATED WHERE CONTRACT PROVIDED FOR MAJORITY AWARD ONLY IN THE EVENT THE THREE ARBITRATORS COULDN'T AGREE. A contract for canning and freezing food products provided for arbitration by two party-appointed arbitrators and an impartial arbitrator appointed by those two. When one of the party-appointed arbitrators resigned, the other two proceeded to the award, although the contract limited majority awards to situations where the three arbitrators could not agree. In vacating the award, the court said: "The remaining two arbitrators had no authority to act until after they had made the selection of a third arbitrator to compose the board of arbitrators." *Craddock v. Herndon*, 300 S.W. 2d 895 (Supreme Ct. of Tennessee, Swepston, J.).

COURT WILL NOT VACATE ARBITRAL AWARD EVEN WHERE ARBITRATOR ERRED IN COMING TO HIS CONCLUSION, except on a showing of "fraud or other legal infirmity." Said the court: "Petitioner now complains that the court should vacate or modify the award made by the very forum which petitioner requested. Petitioner's point is not well taken. Even if the arbitrator erred factually in coming to the conclusion which he did, in the absence of fraud or other legal infirmity, the court has no power but to confirm the award." *WDXB, Inc. v. Fellowes*, N.Y.L.J., August 15, 1957, p. 4, Friedman, J.

ALLEGATION THAT ARBITRATORS DID NOT ACT ON COUNTERCLAIMS REJECTED BY COURT WHERE AWARD SHOWED ON ITS FACE THAT IT WAS "IN FULL SETTLEMENT OF THE CLAIMS OF BOTH PARTIES SUBMITTED TO ARBITRATION." The court, in confirming the award, also rejected the challenge that the arbitrators refused to hear all the evidence. Said the court: "The papers show that no objection was made to the procedure adopted by the arbitrators before the hearings were closed and also that written evidence, memoranda and affidavits of the respondents' experts were submitted to and considered by the arbitrators." *Zinger v. Goldberg*, N.Y.L.J., June 18, 1957, p. 11, Christ, J.

REVIEW OF COURT DECISIONS

ARBITRATORS MAY AWARD INTEREST TO A DATE NO EARLIER THAN THE DATE OF THE AWARD, the court saying: "The award of the arbitrators contained no provision for the payment of interest for said period. The submission of a dispute involving a matter capable of computation of interest confers the power to award interest. It is, however, for the arbitrators to make the award. If it develops that an award of interest is erroneous it may not be reviewed on a motion to confirm (*Matter of Burke*, 117 App. Div. 477, aff'd 191 N.Y. 437). On the other hand, interest may not be allowed, except from the date of the award, if the award fails to grant it, particularly when it is not ascertainable that the claim presented to the arbitrator was liquidated (*People v. Willcox*, 207 N.Y. 743). The petitioner is entitled to interest on the award from the date thereof." *Tabard Press Corp. v. Frederick Kugel Co.*, N.Y.L.J., July 1, 1957, p. 3, Aurelio, J.

AWARD DIRECTING A MANUFACTURER TO PURCHASE A SUPPLIER'S BUSINESS VACATED AS BEYOND AUTHORITY OF ARBITRATOR where contract gave the manufacturer an option to make such purchase but did not put him under an obligation to do so. The contract between the manufacturer and the supplier provided for arbitration of any controversies "relative to prices, values or considerations" or of "differences with respect to the interpretation of its terms." In vacating the award, the court said further: "The law is well established that the power of arbitrators is limited by the terms of the submission, and that an award which exceeds the scope of the submission will be vacated. The arbitrators may not write a new contract for the parties without such parties' consent, nor may they assume authority by merely deciding that they have it." *General Fuse Co. v. Sightmaster Corp.*, 162 N.Y.S. 2d 630 (Gallagher, J.).

AWARD TERMINATING A CONTRACT BETWEEN A HOSPITAL AND A DOCTOR AND COMPENSATING THE DOCTOR IN THE SUM OF \$7814 UPHOLD although the contract, by which the doctor was to operate a pathology laboratory on the premises of the hospital, permitted arbitrators to terminate the contract. Confirmation by a lower court was appealed to the Superior Court of Los Angeles County on the ground that the monetary award was inappropriate where the arbitrators found no wrongful breach of contract by the hospital. Said the court in affirming the confirmation: "Presumably because of the nature of the strife and discussion between the parties, which would make a harmonious continuation of the agreement unlikely, the arbitrators elected to terminate the contract and to compensate Dr. Straus for loss of his contractual rights and the leasehold which was thereby surrendered to the Hospital . . . The parties having conferred upon the arbitrators the power to terminate the contract, it may reasonably be supposed the parties contemplated that such power should be exercised justly and with due regard for the equities of the situation. Stipulations which are necessary to make a contract reasonable are implied in respect to matters as to which the contract manifests no contrary intention." *Straus v. North Hollywood Hospital*, 309 P. 2d 541 (Dist. Ct. of Appeal, Second Div., Fox, J.).

ARBITRATOR IS THE FINAL JUDGE OF MATTERS OF FACT AND LAW BEFORE HIM. An arbitral award in a dispute between a building owner and a contractor was attacked on the ground that the arbitrator had made his own findings of fact which were in some conflict with testimony offered to him. Inasmuch as the parties had not restricted the arbitrator's authority, the award was upheld, the court holding that the parties "must be content with his conclusions unless bias or prejudice are clearly shown." In refuting the challenge of the award, the court added: "Although an arbitration agreement has the formal aspects of a contract, it nevertheless, by its very nature, assumes the absence of an agreement between the parties, other than the basic agreement on the mode of settlement. Arbitration is, then, a method, a means, a procedure, rather than an agreement. In other words, the function of arbitration is not to the creation of such relationships as normally fall within the sphere of contract, but is rather to the repairing of the breakdown of those relationships after the contract has established them. There are standards, or criteria, for decision in arbitration, but these standards are in matters of procedure and evidence more flexible and more dependent upon the requirements of the particular case, or particular disputants, and on the arbitration agreement, than are normally found in the formal judicial settlement of disputes." *Arlington Towers Land Corp. v. John McShain, Inc.*, 150 F. Supp. 904 (Dist. Ct., Dist. of Col., Tamm, D. J.).

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